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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JAME LARRY RHYMER,

Petitioner,

V.

YOKOHAMA TIRE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTION PRESENTED

WHETHER SUMMARY JUDGMENT IS APPROPRIATE IN AN AGE DISCRIMINATION IN EMPLOYMENT ACTION WHERE PLAINTIFF HAS ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION AND HAS RAISED A FACTUAL DISPUTE REGARDING THE VERACITY OF THE EMPLOYER'S PROFFERED REASON FOR THE ALLEGED DISCRIMINATORY ACT AND WHETHER THIS COURT SHOULD GRANT THIS PETITION FOR WRIT OF CERTIORI WHERE THE FOURTH CIRCUIT COURT OF APPEALS' DECISION REQUIRING A PLAINTIFF TO PRESENT DIRECT EVIDENCE OF DISCRIMINATION IN ADDITION TO EVIDENCE THAT THE EMPLOYER'S ARTICULATED REASON IS PRETEXT IS IN CONFLICT WITH ESTABLISHED PRECEDENT OF THIS COURT AND THE DECISIONS OF SEVERAL OTHER UNITED STATES CIRCUIT COURTS OF APPEALS

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TO THE FOURTH CIRCUIT COURT OF APPEALS

James Larry Rhymer petitions for a writ of certiorari to review a judgment of the Fourth Circuit Court of Appeals affirming the summary judgment against him of the United States District Court for the Western District of Virginia.

OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals affirming the District Court's grant of summary judgment against Mr. Rhymer is unpublished and reproduced at Appendix 1. Rhymer v. Yokohama Tire Corporation, unpublished op., No. 96-1191 (January 16, 1997).

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on January 16, 1997. This Court has jurisdiction pursuant to 28 U.S.C. §1254. The Fourth Circuit Court of Appeals had jurisdiction by virtue of 28 U.S.C. Section 1291.

STATUTE INVOLVED

29 U.S.C. Section 623(a)(1): "It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ."

STATEMENT OF THE CASE

A. Statement of Material Proceedings

On January 31, 1992, the Appellee, Yokohama Tire Corporation, fired James Larry Rhymer, a loyal veteran of the Company for twenty-six years, solely because of his age.

Consequently, Mr. Rhymer filed a Complaint in the United States District Court for the Western District of Virginia alleging Yokohama had violated

the Age Discrimination in Employment Act (ADEA).

Yokohama moved for summary judgment claiming that Rhymer could not establish a prima facie case because he had testified in deposition that he had been replaced by an individual who was forty-one years old, and that, in any event, the Company had fired Rhymer due to inadequate job performance.

The District Court granted Yokohama's motion. In its memorandum opinion, the Court found that there was a genuine issue of material fact as to whether Yokohama's explanation was credible because Rhymer had presented evidence that his job performance was satisfactory at the time of his discharge. (J.A. at 25-25). However, the Court held that Rhymer had failed to establish a prima facie case because he had not shown he was replaced by an individual outside the protected class. Moreover, the Court continued that even assuming Rhymer has set forth a prima facie case, Rhymer could not survive summary judgment because although there was a question of fact as to whether the Company's proffered reason for termination, inadequate performance, was false, there still was no evidence that the real reason for termination was age discrimination. (J.A. at 25-26).

On appeal, the Fourth Circuit affirmed the lower Court's summary judgment. It held that Rhymer had established a prima facie case of age discrimination and acknowledged that Yokohama had met its burden by alleging that Rhymer had performed inadequately. The Court then misconstrued the third element of the test questioning whether "the plaintiff has successfully

demonstrated that [he] was the victim of age discrimination on the part of the employer," rather than questioning whether the proffered reason for the termination was pretextual. Thereafter, ignoring the incredulity of Yokohama's alleged reason for Rhymer's discharge, the Court concluded that there was no evidence of age-based animus, and affirmed the district court's summary judgment.

B. STATEMENT OF FACTS

Larry Rhymer was hired by Mohawk Rubber Company (later Yokohama) in 1964. After working for the Company in Akron, Ohio, and Helena, Arkansas, Rhymer transferred to the Salem, Virginia, plant in 1976, where he was plant controller. He later held the position of plant manager for several years, but returned to his position as plant controller, a job he maintained until he was dismissed in January, 1992.

Larry Rhymer's duties as plant controller were widespread. They included, among other things, preparation of the annual budget, controlling all accounts of the budget, appropriations, and production of monthly documents relating to production, variances, and monthly inventories.

With almost no exceptions, Rhymer's performance at Mohawk and Yokohama was unquestioned until only a few months before his discharge. He received yearly raises and bonuses. In fact, Yokohama awarded him a bonus the month before his termination. (J.A. at 108).

Rhymer's job performance was criticized only in the months preceding his firing for his failure to solve a

problem concerning variances or inventory shrinkage, a problem which had always been present at the plant and which everyone knew was totally out of Rhymer's control.

Throughout Mohawk-Yokohama history there were "spending and usage variances" in the production of tires. (J.A. at 47, 120). The variances problem continued to exist after Rhymer was terminated. (J.A. at 49). It was an ongoing problem. Although the concept of variances is difficult for an individual uninitiated in tire production to understand, it basically is a shrinkage or a discrepancy in the cost or the quantity of goods produced. (J.A. at 43).

Although variances were an ongoing problem, they were exacerbated in the latter part of 1991 for several reasons unrelated to Rhymer's performance. (J.A. at 153, 159, 178, 200-201).

In September, 1991, Mr. Hannabusa requested that Rhymer provide an explanation with respect to variances to Matthew Anderson. That request was submitted to Rhymer on October 16, 1991. (J.A. at 202-203). On November 13, 1991, Anderson sent to Rhymer a time-table for initiating steps to analyze and reduce the variances problems. Rhymer completed the tasks he was assigned in that memorandum. (J.A. at 113-14).

In addition, even prior to that directive, Rhymer had instituted a procedure to analyze on a weekly basis the final finish shrinkage. (J.A. at 175). He also prepared a scrap waste report on a weekly and monthly basis in an effort to identify shrinkage. If there was a variance in the report, Rhymer determined why the variance existed. (J.A. at 75-84).

By November 12, 1991, Rhymer had prepared a report analyzing the inaccuracies in the tire count which was causing the usage variance. (J.A. at 117-119). He also hired an individual to monitor the tire count. This count identified the inaccuracies. (J.A. at 117-119). Furthermore, throughout October, November, and December, Rhymer began gathering and developing proposed countermeasures for the usage variance. Ultimately, Rhymer listed these countermeasures and provided them to Anderson and Hannabusa. (J.A. at 160, 130-138).

On November 26, 1991, Anderson penned a memorandum to Mr. Kakutani describing the system put in place for identifying and analyzing the usage variances. (J.A. at 164).

In January, 1992, an outside accounting firm performed an audit of the Salem plant and wrote a letter to Rhymer and Anderson stating the variances had improved remarkably. (J.A. at 200-201).

Even though Rhymer was working ten to twelve hours a day every day to prepare the annual budget and address the variances problem, and despite the fact that variances had been an ongoing problem at the plant that could not be solved without great capital expense, (J.A. at 120), on December 13, 1991, Rhymer received a warning that he must act to correct the variance problem. (J.A. 174).

Although Switzer signed the letter, he stated that he disagreed with it, and he signed it only at the direction of Mr. Hannabusa. (J.A.at 121). Significantly, the warning is based upon a 14,763 unit shortage of tires; yet, on November 13, 1991, Anderson reported that the unit

shortage figure was "misleading." (J.A. at 175).

After Rhymer received this "warning," he presented his proposed countermeasures, (J.A. at 160), to Hannabusa at a meeting on January 22, 1992. These proposals were instituted at the plant, (J.A. at 52), and the variances improved. (J.A. at 49-50). Thus, any perceived deficiency in Rhymer's performance was improved and he was doing fine. (J.A. at 200-201).

Nevertheless, on January 28, 1992, Rhymer was terminated allegedly because he failed to correct the variances. (J.A. at 107).

Neither of Rhymer's immediate superiors participated in the decision to fire him. Switzer stated to Rhymer that he did not know why the Company terminated him. (J.A. at 107). In fact, in December 1991, Switzer, the person who worked most closely with Rhymer, told Hannabusa that he did not believe termination of Rhymer was appropriate. (J.A. at 46A). By January, 1992, Switzer believed Rhymer's performance had improved and acknowledged he had "put certain things into place" to investigate the variances. (J.A. at 44, 200-201).

Indeed, Switzer admitted to Rhymer that Yokohama could not justify his discharge by poor performance. (J.A. at 200-201).

Similarly, Anderson never discussed Rhymer's termination with anyone. (J.A. at 64-65). On December 20, 1991, he was directed by Mr. Kakutani to send a letter to Rhymer stating that Rhymer's performance was unsatisfactory. In fact, Anderson disagreed with that statement. He told Rhymer that he did not have a problem with his job performance. (J.A.

at 188-190). Ironically, one day before Rhymer's termination, Anderson wrote a memorandum in which he discussed working with Rhymer throughout 1992 to improve problems at the Salem plant. (J.A. at 170).

After his termination, Rhymer responded Switzer's telephone inquiries regarding variances, and he returned to the plant at Switzer's request to explain his countermeasures to the variances problem. (J.A. at 71).

REASONS FOR GRANTING THE WRIT

In this case the Fourth Court Circuit Court of Appeals has entirely eviscerated the well-established McDonnell-Douglas proof scheme established by this Court in that it requires the plaintiff in the third step of the scheme to present direct evidence of age-based discrimination, rather than evidence that the defendant's proffered explanation for plaintiff's discharge was pretextual or otherwise unworthy of credence. This decision contradicts both McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and St. Mary's Honor Center v. Hicks, 125 L.Ed. 2d 407 (1993).

Furthermore, this decision is in conflict with other Courts of Appeals which have adhered to this Court's opinions and determined that a jury can infer discrimination from evidence that the employer's proffered reason for discharge is incredible. Although this case is unpublished, it mirrors the Fourth Circuit's decision in Burns v. AAF-McQuay, Inc., 96 F.3d 728 (4th Cir. 1996).

Thus, there truly is a conflict in the Circuits concerning the quantum of

evidence necessary to avoid summary judgment in employment discrimination cases, specifically, whether the incredulity of the employer's proffered reason for the discriminatory act is sufficient evidence to infer discrimination and avoid summary judgment or whether additional evidence is required. The instant case is an ideal one with which to address this issue.

A. THE COURT BELOW WRONGLY DECIDED THAT IN ORDER TO AVOID SUMMARY JUDGMENT THE PLAINTIFF IS REQUIRED TO PRESENT OTHER EVIDENCE OF DISCRIMINATION IN ADDITION TO EVIDENCE THAT THE EMPLOYER'S PROFFERED REASON FOR THE DISCHARGE WAS UNWORTHY OF CREDENCE; THIS DECISION IS IN CONFLICT WITH WELL-ESTABLISHED PRECEDENT OF THIS COURT.

An ADEA plaintiff can meet his burden of proof either through direct or circumstantial evidence or by invoking the scheme of proof developed in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

Under McDonnell Douglas, once a plaintiff has established a prima facie case of discrimination and a defendant has articulated a legitimate reason for the discriminatory act, then the plaintiff must show by a preponderance of the evidence that the defendant's explanations are pretextual or otherwise unworthy of credence. McDonnell Douglas, 411 U.S. at 802; St. Mary's Honor Center, 125 L.Ed 2d at 415-19 (1993).

In the instant case, the Fourth Circuit determined that plaintiff had established a prima facie case and that Yokohoma has articulated a legitimate reason for the termination. Ostensibly

turning to the third step of the McDonell Douglas scheme, the Court questioned whether "the plaintiff has successfully demonstrated that [he] was the victim of age discrimination on the part of the employer." Clearly, this articulation of the McDonnell Douglas test is entirely erroneous and contrary to this Court's interpretation of that test in Hicks. More importantly, it renders the indirect proof scheme endorsed in McDonnell Douglas and Hicks meaningless because it requires an ADEA plaintiff to present direct evidence of age discrimination and denies him the benefit of the indirect proof scheme established by this Court.

In this case there was weighty evidence that Yokohama's articulated explanation was unworthy of credence.

First, Plaintiff's immediate supervisor, Richard Switzer, admitted that Yokohama could not justify discharge because of Rhymer's performance.(J.A. at 200-201). Moreover, Matthew Anderson, Rhymer's second superior, could not state that Rhymer's performance as plant controller was unsatisfactory. (J.A. at 54). In addition, Rhymer received a raise and bonus just before he was terminated, a fact which belies Defendant's position that Rhymer was performing unsatisfactorily.

The crux of Yokohama's argument is that Rhymer did not adequately perform his job because he did not analyze and reduce the usage variances. Rhymer did in fact recommend potential solutions for the variance problem. On November 13, 1991, Anderson sent to Rhymer a time-table for initiating steps to analyze and reduce the variances. Rhymer completed the tasks he was assigned in the memorandum. (J.A. at 113-114). In

addition, Rhymer instituted procedures to analyze shrinkage on a weekly basis, (J.A. at 159), and he prepared reports to help identify shrinkage. If variances were noted, Rhymer determined the cause. (J.A. at 75-84).

On December 20, 1991, less than a month before his discharge, Rhymer submitted to Hannabusa a list of usage variance countermeasures, many of which had already been put into place. (J.A. at 160; 130-138). Ultimately, all these measures were initiated at the Salem plant, and the variance problem improved. (J.A. at 49-50, 52).

Nevertheless, one month after Rhymer submitted proposals to reduce the variances, he was terminated supposedly because he had failed to address the variance problem. (J.A. at 107). Significantly, even after his termination, Switzer requested Rhymer to return to the plant to explain his proposals to plant personnel and help eliminate the variances. Switzer also telephoned Rhymer several times to discuss the variance problems. (J.A. at 51).

Therefore, Yokohama charged Rhymer with the task of identifying and analyzing the variances problem and developing a plan to address the problems, and Rhymer fulfilled that task.

Significantly, the District Court found that Rhymer raised a material fact as to whether his job performance was satisfactory at the time of his discharge. See Appendix at 2, page 9-10.

Thus, Mr. Rhymer raised a genuine issue of material fact that Yokohama's proffered reason for his discharge was a pretext or unworthy of credence. Under

Hicks such evidence is sufficient for a jury to infer discrimination.

In Hicks, this Court affirmed that a factfinder's rejection of the employer's nondiscriminatory reasons, while not sufficient to compel a finding of discrimination, nonetheless suffices to permit such a finding. Id. at ____, 113 S.Ct. at 2749. Accordingly, the Fourth Circuit's decision in this case disregarded this Court's clear precedent in requiring Mr. Rhymer to present direct evidence of age-based animus in addition to evidence that Yokohama's proffered reason was unbelievable.

B. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

Several Circuit Courts of Appeals have analyzed Hicks and concluded that where a plaintiff establishes a prima facie case and introduces evidence sufficient to discredit the defendant's proffered nondiscriminatory reason, the factfinder may infer discrimination. Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995); Saulpaugh v. Monroe Community Hospital, 4 F.3d 134, 142 (2d Cir. 1993); Courtney v. Biosound, Inc., 42 F.3d 414, 418 (7th Cir. 1994); Krenik v. County of LeSueur, 47 F.3d 953, 958 (8th Cir. 1995); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993); Howard v. BP Oil Co., Inc., 32 F.3d 520, 525 (11th Cir. 1994).

Thus, the burden of a plaintiff on summary judgment is to establish a prima facie case of discrimination and to raise a genuine issue of material fact as to whether Defendant's articulated reason was pretextual. Washington, 10 F.3d at

1433; Courtney, 42 F.3d at 418; Howard, 32 F.3d at 525.

Because the factfinder is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment. Washington, 10 F.3d at 1433.

Additionally, Hicks holds that proof that a defendant's articulated reasons are false is not proof of intentional discrimination; it is merely evidence of intentional discrimination. However, evidence of intentional discrimination is all a plaintiff needs to defeat a motion for summary judgment. Howard, 32 F.3d at 525.

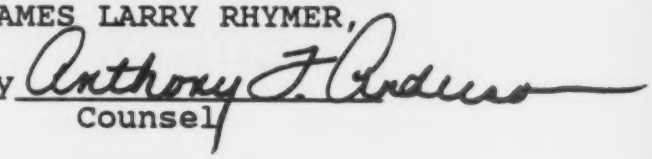
In the instant case, Rhymer unquestionably raised a genuine factual issue as to the authenticity of Yokohama's explanation that it terminated Rhymer because he was not performing his job satisfactorily. Yet, the Court eschewed the well-reasoned opinions of six Circuit Courts of Appeals and determined that even though Rhymer had presented evidence that Yokohama's proffered reason was false, summary judgment was nonetheless appropriate because he failed to produce other additional evidence of discrimination. Clearly, this decision contravenes precedent developed by this Court over two decades ago.

CONCLUSION

The lower Court's ruling in this case disregards established precedent and is in conflict with decisions of other Courts of Appeals. Accordingly, this Court should accept this Petition and reverse and remand the case for a trial on the merits.

Respectfully submitted,

JAMES LARRY RHYMER,

By 
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APPENDIX

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS A-1

FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA A-14

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA A-15

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES LARRY RHYMER, Plaintiff-Appellant,	)	
v.	)	No. 96-1191
YOKOHAMA TIRE CORPORATION, formerly known as Mohawk Rubber Company, Defendant-Appellee	)	

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.
James C. Turk, District Judge.
(CA-93-198-R)

Argued: December 4, 1996

Decided: January 16, 1997

Before RUSSELL and MICHAEL, Circuit Judges, and DAVIS, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Melissa Windham Friedman, Roanoke, Virginia, for Appellant. Thomas R. Crookes, BROUSE & MCDOWELL, Akron, Ohio, for Appellee. **ON BRIEF:** Anthony F. Anderson, Roanoke, Virginia for Appellant. R. Scot Harvey, BROUSE & MCDOWELL, Akron, Ohio; Bayard E. Harris, Agnis C. Chakravorty, THE CENTER FOR

EMPLOYMENT LAW, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

James Rhymer appeals the award of summary judgment to his former employer, Yokohama Tire Corporation (Yokohama), on his claims for discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., and for breach of an implied contract of employment. Finding no error, we affirm the district court.

I.

In 1964 Rhymer was hired by Mohawk Rubber Company (Mohawk), the predecessor to Yokohama. After working for Mohawk in Akron, Ohio, and Helena, Arkansas, Rhymer was transferred to the Salem, Virginia, plant in 1976. At Salem Rhymer initially served as plant controller. Later, he was plant manager for several years, but he eventually returned to his old position as plant controller, the job he held until the was terminated on January 28, 1992.

Upon his arrival at the Salem facility, Rhymer received an employee handbook and was told that the book contained the general rules for plant employees. Rhymer testified in his deposition that the person who gave him the handbook said that it guaranteed his employment if he did an acceptable job.

Rhymer admitted, however, that he reviewed the handbook and found no mention of a guarantee of employment.

Yokohama purchased Mohawk in 1989. Yokohama's corporate offices were in Akron, Ohio. After the acquisition, Rhymer primarily reported to Richard Switzer, the plant manager at Salem, and Matthew Anderson, the acting corporate controller in Akron.

Rhymer's duties as plant controller were varied and extensive. He was responsible for all of the plant's finances, including budget preparation and the preparation of reports and analyses relating to usage and spending variances. During most of his employment with Yokohama, Rhymer was regarded as a good employee. He received yearly raises and bonuses, including a bonus the month before his termination. However, in the months preceding his termination, Rhymer came under increasing pressure to address the problem of usage and spending variances at the Salem plant. A usage variance problem meant that too few tires were being produced for the amount of raw materials purchased. A spending variance problem meant that material and service costs were exceeding company standards or were too high.

Both Switzer, the plant manager, and Anderson, the acting corporate controller, told Rhymer that they were concerned about his inability to analyze the variance problem and to suggest countermeasures. On December 13, 1991, Switzer sent Rhymer a letter warning him that his treatment of the problem of "inventory shortages" (that is, usage

variance) at the Salem plant "had not been satisfactory." On December 20, 1991, Anderson sent Rhymer a letter telling him that he "must be pro-active instead of reactive" in analyzing and recommending potential solutions to the usage variance problem. On January 22, 1992, Rhymer attended an executive committee meeting in Akron. The minutes of the meeting reflect the following: Switzer announced the Rhymer would speak on the variance issue. After Rhymer made his presentation. Y. Hanabusa (the company president) asked why the usage variance problem was worse in 1991 than in 1990 and 1989. Rhymer could not explain, asserting that he lacked the right tools. For example, Rhymer said that he received information too late to control the problems. Hanabusa indicated his displeasure with Rhymer and told him that he was the person responsible for controlling variances and costs.

On January 28, 1992, Rhymer was terminated. He was 54 at the time. Hanabusa, not Switzer or Anderson, made the decision to terminate Rhymer. Yokohama cited Rhymer's inability to perform the analytical and financial roles of a plant controller, including him inability to deal with the variance problem, as the reason for his termination. The parties dispute which person of persons assumed Rhymer's duties after his termination. Rhymer claims that Gary Purdy, age 41, took over most of his work.

Rhymer sued Yokohama in district court, claiming that Yokohama discharged his because of his age in violation of the ADEA and that Yokohama breached his

employment contract that was created, Rhymer asserts, by an employee handbook. The district court granted Yokohama's motion for summary judgment, concluding that Rhymer failed to establish a prima facie case of age discrimination and failed to establish the existence of a valid employment contract under Virginia law. Rhymer appeals.

II.

We review grants or denials of motions for summary judgment de novo. Jackson v. Kimel, 992 F.2d 1318, 1322 (4th Cir. 1993). If there is no genuine dispute as to a material fact, the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). In a discrimination case "[a]n employer is entitled to summary judgment if the plaintiff fails to establish a prima facie case of discrimination or fails to raise a factual dispute regarding the employer's proffered reasons for the alleged discriminatory act." Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir. 1995). We noted in EEOC v. Clay Printing Co., 955 F.2d 936, 943 (4th Cir. 1993), that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). To establish a claim under the ADEA, "a plaintiff must show that but for the employer's motive to discriminate against plaintiff on the basis of age, the discriminatory action would not have occurred." Henson, 61 F.3d at 274 (citations omitted).

A.

On his ADEA claim Rhymer relies upon the indirect, burden-shifting method of proof developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982) (adopting McDonnell Douglas presumption framework in ADEA cases). If a plaintiff proceeds under the McDonnell Douglas framework, the case essentially breaks into three steps. First, the plaintiff must establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802. Second, the defendant must respond with a nondiscriminatory reason for the termination. McDonnell Douglas, 411 U.S. at 802. Third, if the defendant responds with a legitimate nondiscriminatory reason, the "plaintiff must then bear the ultimate burden of persuasion and show by a preponderance of the evidence that the defendant's explanations are pretextual or otherwise unworthy of credence." Henson, 61 F.3d at 275 (citations omitted).

When the district court granted summary judgment to Yokohama, there were four factors that a plaintiff had to demonstrate to make out a prima facie case for age discrimination in this circuit. O'Conner v. Consolidated Coin Caterers Corp., 56 F.3d 542, 546 (4th Cir. 1995), rev'd 116 S.Ct. 1307 (1996). The plaintiff had to show (1) that he was a member of the protected class (ages 40-70), (2) that he had been discharged, (3) that he was performing his job at a level that met his employer's legitimate expectations, and (4) that he was replaced by someone of comparable

qualifications outside the protected class. Id. at 546. The district court concluded that Rhymer had failed to meet the fourth factor because he was replaced by someone within the protected class.

After the district court's decision the Supreme Court rejected our fourth factor for a prima facie case in age discrimination cases. See O'Conner v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307 (1996). In Consolidated Coin Caterers the Supreme Court said that "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." Id. at 1310 (emphasis added). The Supreme Court left our first three factors intact.

Here, we agree with the district court that Rhymer made out the first three factors of a prima facie case. However, in light of the Supreme Court's decision in Consolidated Coin Caterers, we must reassess whether Rhymer has met the fourth factor, that is, whether he has shown that he was replaced by someone substantially younger.

Rhymer was 54 years old when Yokohama terminated him, and there is a dispute as to which person or persons replaced Rhymer. Rhymer contends that he was replaced primarily by a new hire, Gary Purdy, who was 41. Yokohama contends that Rhymer's duties were given to several persons of various ages: Purdy, Robert Craig (age 58), Yohio Amano (age 46), and Robert Keen (age 45).

Because we must view all factual inferences in a light that favors the non-moving party, see Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986), we will accept Rhymer's contention that he was primarily replaced by Purdy. Purdy, age 41, was substantially younger than Rhymer, who was 54. Because Rhymer met the (modified) fourth factor, he did establish a prima facie case.

The burden then shifts to Yokohama to respond with a legitimate nondiscriminatory reason for the termination. McDonnell Douglas, 411 U.S. at 802. Yokohama cites Rhymer's poor job performance, specifically his inability to analyze and to recommend solutions for the usage variance problem. This explanation is sufficient to discharge Yokohama's burden of production at the second step.

We continue to the third step of the McDonnell Douglas scheme and address the "straightforward" question of whether "the plaintiff has successfully demonstrated that [he] was the victim of age discrimination on the part of the employer." Burns v. AAF-McQuay, Inc., 96 F.3d 728, 732 (4th Cir. 1996) (quoting Henson v. Liggett Group, Inc., 61 F.3d 270, 275 (4th Cir. 1995) (citations omitted)). "[I]f the plaintiff offers nothing to disprove the defendant's nondiscriminatory explanation[], the explanation['s] weakness alone is insufficient to create an issue of pretext." Id. The plaintiff bears the ultimate burden of presenting "affirmative evidence of age-based animus." Id.

Rhymer argues that his immediate supervisors, Switzer and Anderson, did not agree with Hanabusa's decision to fire him. He reasons, therefore, that his job performance must have been satisfactory and the real reason for his termination must have been his age. Rhymer did not take the deposition of Hanabusa, the person responsible for the decision to fire Rhymer. But there is evidence in the record (including the minutes of the January 22, 1992, the executive committee meeting) suggesting that Hanabusa was dissatisfied with Rhymer's job performance. Although Switzer and Anderson, who were themselves critical of Rhymer's performance, did not think that Rhymer's inadequacies rose to a level warranting termination, that does not support an inference that Hanabusa (the company president) fired Rhymer because of age discrimination.

Rhymer also relies on the fact that since February 1992 Yokohama has hired ten management persons, and only one of those hired was within the protected class (age 40-70). Rhymer, however, produced no demographic information about the pool of employees at Yokohama nor about the pool from which employees were hired. Without data about the relevant labor pool, the figures offered by Rhymer are not proof of discrimination. See Henson, 61 F.3d at 276.77.

Finally, in an affidavit Rhymer said, "Yokohama employees have commented to me that they have heard Mr. Akashi state that perhaps older workers should be replaced because they would not change their ways." "[A]lleged discriminatory statements can be indicative of

discrimination." Henson, 61 F.3d at 276. However, to constitute probative evidence any statement must relate to a "particular person, employment decision, or pattern of decisionmaking." Id.; see also Clay Printing, 955 F.2d at 941-42 (noting there was no nexus between the alleged discriminatory statements and any employment decisions made by the employer). Assuming Rhymer could overcome the hearsay problems with the statement attributed to Akashi, Rhymer has still not shown that there was any connection between the Akashi statement and Hanabusa's decision to terminate him.

We must conclude that the evidence Rhymer relies on to show age-based animus is not sufficient to create a genuine issue of material fact on the ultimate question of whether Yokohama intentionally discriminated against him because of his age. We therefore affirm the district court's grant of summary judgment to Yokohama on Rhymer's ADEA claim.

B.

Rhymer also contends that the district court erred when it granted Yokohama summary judgment on his breach of contract claim. Rhymer argues that the employee handbook constituted on implied promise that he would be fired only "for cause" and thus rebutted any presumption of at-will employment.

The district court determined correctly that Virginia law governs the contract issue because the parties entered into the employment relationship in Virginia. See Nguyen V. CNA Corp., 44

F.3d 234, 237 (4th Cir. 1995). Virginia adheres to the common law rule that absent a provision to the contrary, contracts for the rendition of services are at-will. Miller v. SEVAMP, Inc., 362 S.E.2d 915, 916-17 (Va. 1987). In a case interpreting Virginia law, we said that we will not "imply a just cause provision where one is not explicitly provided." Nguyen, 44 F.3d at 238 (quoting Sullivan v. Snap-On Tools Corp., 708 F. Supp. 750, 752 (E.D. Va. 1989)).

Rhymer contends that the following section in the employee handbook creates a right not to be fired without cause:

LOSS OF SERVICE: There are several ways an employee can lose his service. The following things will result in loss of service:

(1) Voluntary termination of employment.

(2) An employee absent for three consecutive days without permission will be regarded as a voluntary resignation.

(3) Discharge for just cause: This could include violation of rules, unsatisfactory work performance, or improper conduct.

....

(Emphasis added). A common sense reading of the employee handbook defeats Rhymer's contention. The phrase mentioning "just cause" was placed in the employee handbook under the "LOSS OF SERVICE" heading. The handbook defines "service" as "the time that the employee has worked

for the Company. It gives the employee certain preferences or ranking when decisions must be made in regard to promotions, reduction in forces and determination of eligibility for the various benefits." (Emphasis added). "Discharge for just cause" is simply one of the ways in which "service" time can be lost. Thus, the phrase is not used as an explicit "just cause" provision which would limit the company's ability to terminate employees. Indeed, nowhere in the handbook does it say that an employee can be discharged only for just cause.

In addition, Virginia recognizes the concept of mutuality of engagement. See Town of Vinton v. City of Roanoke, 80 S.E.2d 608, 617 (Va. 1954) (noting that "there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement.") (citations omitted). "Notions of fundamental fairness underlie the concept of mutuality which extends a corresponding freedom to the employer." Miller, 362 S.E.2d at 917. "It is hornbook law that a contract terminable at the will of one party is terminable at the will of the other . . . ." Hicks v. Freeman, 397 F.2d 193, 194-95 (4th Cir. 1968). Rhymer testified in his deposition that he would have been free to quit his job with Yokohama anytime he wished. He also admitted that he had looked at the employee handbook and found no guarantee of employment. In light of the language in the employee handbook and Rhymer's admissions during his deposition, we agree with the district court's determination that Rhymer's admissions during his deposition, we agree with the district court's

determination that Rhymer has not offered sufficient evidence to rebut the presumption that he was an at-will employee.

III.

The district court's award of summary judgment to Yokohama Tire Corporation is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JAMES LARRY RHYMER, Plaintiff	)	
v.	)	Civ Action No. 93-0198-R
YOKOHAMA TIRE CORPORATION, Defendant	)	FINAL ORDER By: The Hon. James C. Turk, Jr. United States District Court

In accordance with the memorandum opinion filed this day, it is hereby **ADJUDGED AND ORDERED** that sumamry judgment is **GRANTED** in favor of the defendant. This matter is stricken form the active docket of the Court.

The plaintiff is advised that he may appeal this decision pursuant to Rule 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within 30 days of the date of entry of this order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to all counsel of record.

ENTER: This 1st day of November, 1995.

James C. Turk
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JAMES LARRY RHYMER, Plaintiff	)	
v.	)	Civ Action No. 93-0198-R
YOKOHAMA TIRE CORPORATION, Defendant	)	MEMORANDUM OPINION By: The Hon. James C. Turk, Jr. United States District Court

The plaintiff, James Larry Rhymer ("Rhymer"), brings this action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., along with a claim for breach of his employment contract. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367. The defendant, Yokohama Tire Corporation ("Yokohama"), has filed a motion for summary judgment. Upon reviewing the parties' briefs and submissions, and after hearing oral arguments, the court is of the opinion that the defendant is entitled to judgment as a matter of law.

I.

Rhymer was hired by the Mohawk Rubber Company in 1964. After working for the company in Akron, Ohio and Helena, Arkansas, Rhymer transferred to the Salem, Virginia plant in 1976. There Rhymer served as the plant controller. He later became the plant manager for several years, then returned to his position as plant controller until he was dismissed on January 28, 1992.

Upon transferring to the Virginia

facility, Rhymer received a copy of an employee handbook, and was told that the book contained the general rules for plant employees. The handbook lists certain misconduct that is considered inexcusable "and may result in immediate discharge," misconduct which warrants at least one warning before discharge, and misconduct which results in at least two warnings before an eventual discharge. The handbook also outlines a seniority system, under which employees earn "service time" which can affect decisions about promotions, work force reductions, and eligibility for benefits. One of the ways in which an employee may lose service time is if he or she is discharged for just cause. A "just cause" dismissal "could include violation of rules, unsatisfactory work performance, or improper conduct." At the time Rhymer received his copy of the employee handbook, the personnel director of Mohawk also told him that his employment was guaranteed so long as he performed his job in an acceptable manner.

Yokohama purchased the Mohawk Rubber Company in 1989. The president of the company, Mr. Hannabusa, worked out of Yokohama's corporate offices in Akron, Ohio. Richard Switzer was the plant manager in Salem. Rhymer, as the plant controller, reported to Switzer in Salem, and to Matthew Anderson, the acting corporate controller, in Akron. Switzer, in turn, was supervised by Mr. Akaski, a vice-president of the company and the general manager of the Salem plant. Matthew Anderson was supervised by Mr. Kojima, the company's treasurer, and by Mr. Kakutani.

As plant controller, Rhymer was

responsible for preparing the annual budget, controlling all accounts of the budget, approving appropriations, and preparing monthly documents describing the plant's production, its monthly inventories, and any variances in those numbers.

During his period of employment at Yokohama, Rhymer's job performance was rarely criticized. He received yearly raises and bonuses -- including a bonus awarded to him the month before he was terminated. In the months preceding his termination, however, Rhymer came under increasing pressure to address spending and usage variances in the plant's production of tires. The problem essentially consisted of discrepancies in the Salem plant's cost for producing tires and the actual number of tires manufactured.

Rhymer contends that the variances problems was exacerbated in the latter half of 1991 because of changes in production, leading to costs which had not been incorporated into that year's budget. He contends that Mr. Hannabusa asked him to prepare a report explaining the variances and to submit the report to Matthew Anderson. Anderson sent Rhymer a time table for analyzing and reducing the variances. Rhymer claims that, in accordance with the proposed time table, he instituted a procedure to analyze the variance problem. By November 12, 1991, Rhymer had prepared a report which analyzed the inaccuracies in the plant's tire count, which he believed was a cause of the usage variance. Rhymer says that he sent a memorandum to Mr. Kakutani describing the system that would identify and analyze the usage variances. Rhymer also alleges that an outside accounting

firm performed an audit of the Salem plant in January 1992, and concluded that the variance problem had improved.

Rhymer claims that, in spite of his best efforts at addressing the variance problem, the company warned him in December 1991 that he was responsible for correcting the problem. After receiving the warning, Rhymer proposed countermeasures to the problem; those suggestions were later instituted at the plant.

On January 29, 1992, Yokohama terminated Rhymer, citing his failure to correct the variances as the reason for his dismissal. Rhymer contends that neither of his direct supervisors participated in the decision to fire him. In fact, Switzer disagreed with the company's decision to terminate Rhymer. Anderson was not consulted about the decision, but believed that it resulted from problems that Rhymer was having in utilizing a new system which required him to analyze data and submit reports on his findings. Rhymer asserts that both Switzer and Anderson told him that they had no problem with his job performance, and that they believed the company had bee unjustified in firing him.

Following Rhymer's dismissal, the job duties that had been assigned to him were distributed among several existing employees. The company hired two other management-level employees to assume some of those responsibilities: Richard Gross, age 37 at the time of hire; and Gary Purdy, age 40 at the time of hire.

Rhymer then brought this action, alleging that Yokohama's decided to fire him because of his age, in violation of the ADEA. Rhymer also asserts that the company breached an implied employment

contract to fire him only for "just cause" according to language contained in the employee handbook.

Yokohama argues that Rhymer cannot sustain either of his claims, and that summary judgment should be entered in its favor. Yokohama asserts that Rhymer had not made out a prima facie case on his ADEA claim because he has not produced any evidence which directly or indirectly demonstrates that the company discriminated against him because of his age. The defendant asserts that the evidence submitted by Rhymer on this issue is neither admissible nor probative of the company's discriminatory intent. Further, even if Rhymer has established a prima facie case, the defendant contends that he cannot meet his ultimate burden of showing that Yokohama acted with discriminatory intent, in light of the company's proffer of a legitimate, nondiscriminatory reason for the termination. On Rhymer's breach of contract claim, Yokohama contends that the language of the employee handbook is insufficient to rebut the common law presumption that an employment relationship exists at the will of both the employer and the employee. Even if the handbook creates some ambiguity as to the terms of Rhymer's employment, the company argues that the parties are subject to the doctrine of mutuality and that the handbook is inadmissible under Virginia's statute of frauds. A review of the evidence submitted by the parties, and of the applicable law, has demonstrated to the court that the defendant's assertions are correct. Yokohama is entitled to judgment as a matter of law on both claims.

II.

Federal Rule of Civil Procedure 56 provides a mechanism for parties to bypass a trial and to have judgment entered when a moving party shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. "Thus, when the parties submit admissible evidence on the issue in question under a summary judgment motion, the court can determine that a trial is unnecessary only if either the facts are undisputed, or if disputed, the dispute is of no consequence to the dispositive question." Mitchell v. Data General Corp., 12 F.3d 1310, 1315-16 (4th Cir. 1993). On a motion for summary judgment, the party who will carry the burden of proof at trial must be able to show that there exists a genuine issue of material fact as to every element of his claim. Anderson v. Liberty Lobby, 477 U.S. at 249 (summary judgment appropriate where evidence insufficient to present question to a jury) (citing Akickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The summary judgment mechanism is used to scrutinize the plaintiff's case to determine whether the plaintiff "has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of his claim at trial." Mitchell, 12 F.3d at 1316.

The proof scheme followed in a discrimination case can make an analysis at summary judgment "somewhat trickier." Id. A defendant can still demonstrate that he is entitled to judgment by showing that the plaintiff lacks the evidence to support a prima facie case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In determining whether a genuine

issue of material fact has been raised, the court must construe all inferences in favor of the non-moving party. Anderson, 477 U.S. at 251-52.

III.

In order to establish a claim under the ADEA, the plaintiff may proceed in either of two manners. The plaintiff's first option is to establish that but for the defendant's motivate to discriminate against him because of his age, he would not have been discharged. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982). This burden is met by producing evidence, either direct or indirect that is "relevant to and sufficiently probative of the issue" of the defendant's intent. EEOC v. Clay Printing Co., 955 F.2d 936, 940 (4th Cir. 1992).

Alternatively, the plaintiff may establish his case through the proof scheme articulated for Title VII cases in McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973), which is applicable to ADEA cases. See Mitchell, 12 F.3d at 1314-15; EEOC v. Western Electric Co., 713 F.2d 1011, 1014 (4th Cir. 1983). To state a prima facie case on an ADEA claim under the McDonnell Douglas scheme, the plaintiff must show:

(1) he is in the protected age group; (2) he was discharged or demoted; (3) at the time of discharge of demotion, he was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge of demotion, he was replaced by someone of comparable qualifications outside the protected class.

O'Conner v. Consolidated Coin Caterers Corp., 56 F.3d 542, 546 (4th Cir. 1995),

(citing Mitchell, 12 F.3d at 1314-15; and Western Electric Co., 713 F.2d at 1014). A plaintiff must establish all four elements in order to make out a prima facie case; satisfying only three of the elements will not allow the plaintiff's claim to withstand summary judgment. Id. at 547. The Fourth Circuit has also interpreted the elements rather strictly -- a plaintiff must be able to show that he was replaced by a person outside of the protected class. Id. at 546, n.1 (noting that while some circuits have allowed ADEA plaintiffs to meet the fourth requirement by showing that their replacement was substantially younger, "Fourth Circuit precedent has required a plaintiff to demonstrate that his replacement was outside the protected class,") (citing Clay Printing Co., 955 F.2d at 943).

If the plaintiff is able to meet the prima facie elements, the presumption arises that the termination or demotion was discriminatory. The defendant is then entitled to put forth a nondiscriminatory reason for the termination or demotion. Once the defendant does so, the plaintiff has an opportunity to show that the defendant's purported reason is pretextual, and that the actual reason for the termination was the employer's discriminatory intent. "The employer's proffered reason is not pretextual 'unless it is shown both that the reason was false, and that discrimination was the real reason.'" Sandhu v. Com. of Va. Dept. of Conserv. & Rec., 874 F.Supp. 122, 125 (E.D. Va. 1995) (quoting St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742 (1993)). If the plaintiff fails to show that there is a genuine dispute of fact over the

employer's nondiscriminatory reason, he has not satisfied his burden and the defendant may prevail as a matter of law. Id. (citing Mitchell, 12 F.3d at 1317).

The plaintiff in the present matter is unable to withstand summary judgment under either method for establishing a prima facie case. The direct evidence Rhymer offers of the company's subjective intent largely consists of the plaintiff's recollection of general comments made by unidentified Yokohama employees during a trip to Japan. In his deposition, Rhymer says that he believes he was discriminated against because the Japanese employees mentioned that "older people have difficulty changing their ways." In a later affidavit, Rhymer asserts that "Yokohama employees have commented to me that they have heard Mr. Akaski state that perhaps older workers should be replaced because they would not change their ways." Neither of these assertions by the plaintiff provide credible evidence of the defendant's intent to discriminate. Because he does not provide the direct testimony of those who allegedly made such comments (he does not even identify who made the remarks), Rhymer's statements are purely heresy and would be inadmissible at trial. See Fed. R. Evid. 802. As the Fourth Circuit noted in O'Conner, 56 F.3d at 548-49, "[w]hile derogatory remarks may be direct evidence of age discrimination, . . . the decisional law 'clearly reflects that isolated and ambiguous statements . . . are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination,'" (quoting Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989) (other citations omitted). Such is the case

with the statements purporteded made by Yokohama employees; they are not probative of the company's alleged intent to discriminate against the plaintiff because of his age.

The plaintiff also attempts to support his claim of discrimination through statistics showing that, after his dismissal, only one of ten individuals hired into management positions with Yokohama were within the protected class. The defendant argues that under Carter v. Ball, 33 F.3d 450 (4th Cir. 1994), Rhymer's statistics are not relevant because they do not compare the company's hiring practices with the available job pool. In Carter, the Fourth Circuit declared that a trial judge could justifiably exclude statistical information that lacked this comparison or that was unsupported by expert testimony on the methodology and relevance to the plaintiff's claim. Id. at 456-47 (applying Title VII scheme to claim of racial discrimination). Similarly, in O'Conner the court determined that the plaintiff's statistical evidence was not probative of discriminatory intent where only a small pool of individuals was studied. 56 F.3d at 548 (citing Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir.) (four individuals is too small a sample), cert. denied, 115 S.Ct. 666 (1994); and Simpson v. Midland-Ross Corp., 823 F.2d 937 (6th Cir. 1987) (sample of seventeen of age discrimination case was suspect)). Without referencing the relevant job pool, the plaintiff cannot show how his preferred statistics support an inference of disparate impact or of direct age discrimination.

In essence, Rhymer has submitted no

direct or indirect evidence on the issue of Yokohama's subjective intent to discriminate. He therefore has not shown that but for the company's intentional discrimination, he would not have been terminated. See Goldberg v. B. Green and Co., Inc., 836 F.2d 845, 948 (4th Cir. 1988) ("[Plaintiff's] own naked opinion, without more, is not enough to establish a prima facie case of age discrimination.").

Rhymer's claim also fails under the McDonnell Douglas scheme. The plaintiff does meet the first two requirements -- he is a member of the protected class under the ADEA, and he was terminated by his employer. The plaintiff raises a material issue on the third element of whether his job performance was satisfactory at the time of his discharge. Rhymer has submitted evidence to suggest that his job performance did indeed meet the expectations of Yokohama management. His immediate supervisor disapproved of the company's decision to terminate Rhymer, and the company awarded Rhymer a bonus just prior to its decision to fire him. The plaintiff has also submitted evidence and testimony that he took actions to improve the variance problem at the Salem plant, although he maintains that he was not responsible for finding solutions to the problem or for implementing proposed solutions.

Rhymer cannot meet the final element of the McDonnell Douglas test, however, the plaintiff asserts that his duties were largely assumed by Gary Purdy, who was forty-one years old at the time Yokohama hired him. The plaintiff recognizes that his duties were taken over by several employees, and points to two individuals who were under forty

years old at the time of his discharge -- Matthew Anderson and Richard Gross. The defendant counters that Rhymer's duties were distributed among seven employees -- five of whom fall within the protected age class. The average age of those assuming Rhymer's responsibilities was over forty years old. According to the recent O'Conner opinion, the plaintiff cannot prevail on an ADEA claim if he was replaced by someone within the protected class. 56 F.3d at 546 n.1; see also Eder v. ITT Corp., et al, NO. 91-0399-R (W.D. Va. Sept. 13, 1993), slip op. at 4-5 (fact that plaintiff's duties were assumed by some individuals outside of the protected age class insufficient to withstand summary judgment where duties also assumed by some individuals within the protected age class).

The only other foundation for the plaintiff's belief that he was terminated because of his age is that his immediate supervisors were not involved in the decision to fire him, and that one of his supervisors, Switzer, has expressed his disagreement with the company's decision. This contention does not demonstrate that the Yokohama officials who were involved in terminating Rhymer discriminated against the plaintiff because of his age. Instead, this circumstance tends only to support Rhymer's contention that he and his supervisors believed that he was performing his job adequately. This dispute alone, however, will not sustain a claim of age discrimination. The plaintiff must be able to provide some evidence either that he personally was discriminated against because of his age, or that his employer did not treat age in a neutral fashion. Simply because a decision was made at a higher level than

the plaintiff may have expected does not show that discrimination was involved.

Furthermore, even if the court were to find that Rhymer has established a prima facie case of age discrimination, the defendant had put forth evidence of a legitimate, nondiscriminatory reason for the plaintiff's discharge. In order to rebut Yokohama's evidence that he was fired because of poor job performance, Rhymer must show that the company's reason was pretextual and that the real reason was age discrimination. St. Mary's Honor Ctr., 113 S.Ct. at 2752. In St. Mary's Honor Center, the Supreme Court reasoned that, once the defendant had put forth a legitimate reason for its actions, "the inquiry now turns from the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced." Id. The burden of proving discrimination lies ultimately with the plaintiff. Mitchell, 12 F.3d at 1317 ("All of the evidence must be considered in determining whether the plaintiff met his ultimate burden of proving that the employer intentionally discriminated against the employee by reason of age, and that age was a determinative factor in the adverse employment decision."). It is clear from a review of all of the evidence presented by the plaintiff that he is unable to meet this burden. No material facts have been presented to the court that would give rise to a legitimate issue of age discrimination. Therefore, summary judgment will be entered in favor of the defendant on the plaintiff's ADEA claim.

IV.

Rhymer also claims that his implied employment contract, created by the provisions of an employee handbook, was breached when Yokohama decided to fire him. Rhymer contends that the handbook constituted a promise that he would only be fired "for cause" and after a clear warning. He disputes that the company had cause to discharge him.

The claim is governed by Virginia common law, and this court exercises jurisdiction pursuant to 28 U.S.C. § 1367. The Fourth Circuit has recently acknowledged Virginia's strict adherence to the presumption of an at-will employment relationship. In Nguyen v. CNA Corp., 44 F.3d 234, 237-38 (4th Cir. 1995), the court summarized:

> [W]here an employment relationship of contract is for an indefinite term, either party may terminate that relationship for any reason upon reasonable notice. Graham v. Central Fidelity Bank, 428 S.E.2d 916, 917 (Va. 1993) . . .Although a party may rebut the presumption of an at-will employment relationship "if sufficient evidence is produced to show that the employment is for a definite, rather than an indefinite, term," Progress Printing Co., Inc v. Nichols, 421 S.E.2d 428, 429 (Va. 1992), the Supreme Court of Virginia has made clear that in order to show sufficient evidence of a definite term, "there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement." Miller v. SEVAMP, Inc., 362 S.E.2d 915, 917 (Va. 1987) (quoting Town of Vinton v. City of Roanoke, 80 S.E.2d

608 (Va. 1954)). Accordingly, the court is not to "imply a just cause provision where one is not explicitly provided." Sullivan v. Snap-On Tools Corp., 708 F. Supp. 750, 752 (E.D. Va. 1989).

Virginia law also requires that an employment contract with a duration of greater than one year comply with the statute of frauds. This rule is equally applicable to terms created by employment handbooks. "[A]n employment term created by a termination for cause condition, while definite, is not one capable of being performed within one year . . . . Therefore, a termination for cause provision used to overcome the presumption of employment at will must be in an employee manual or other documents which complies with the statute of frauds" Progress Printing, Co., 421 S.E. 2d 430 (citing Falls v. Virginia State Bar, 397 S.E.2d 671, 672 (Va. 1990)). A company logo which appears on the employee manual is insufficient to meet the statute of frauds requirement that the document be signed by the party being charged with a breach. Falls, 397 S.E. 2d at 673.

In this case, the employee handbook distributed by Yokohama's predecessor does not contain an explicit "just cause" provision. Rather, it lists several ways in which an employee can lose "service time" which would otherwise count towards certain employment privileges such as promotions and benefits. The handbook states that an employee may lose service time it he or she is dismissed for just cause, "which could include" violations of company rules, unsatisfactory work performance, or improper conduct. The

language of this paragraph suggests that the "just cause" list is not exclusive. This section of the handbook also does not specifically discuss procedures for layoffs or terminations; it merely explains how such a decision might affect an employee's privileges or benefits. A later section of the handbook lists the rules of employee conduct, and outlines what action the company might take in response to a violation. The possible responses range from an immediate discharge to a series of warnings that are provided before a discharge. The handbook explains that the rules and regulations are divided into three main groups, according to the seriousness of the misconduct. The handbook further explains that the violations described in the book are "examples of some violations."

Given the ambiguity of the language contained in this employee handbook, it would be difficult for the court to inter the existence of an implied contract term that the plaintiff here would be dismissed only for just cause. Certainly there is no clear statement that the company's policy is to dismiss its employees only for just cause. See Sullivan, 708 F. Supp. at 752.

Furthermore, the handbook provided to the plaintiff does not comply with the Virginia Statute of Frauds -- it has not been signed by either the defendant, Yokohama, or its predecessor, Mohawk Rubber Company. The length of Rhymer's tenure with the rubber company shows that his employment contract could not be performed within one year. The employee handbook, therefore, is inadmissible as evidence of an implied contract term to terminate only for just cause.

The plaintiff points to two cases from this court's district in which the trial judge allowed evidence from an employee handbook to rebut the presumption of an at-will employment. See Seabolt v. Westmoreland Coal Co., 703 F. Supp. 1235 (W.D. Va. 1989); and Barger v. General Electric Co., 599 F.Supp 1154 (1984). These decisions were rendered at a time when Virginia law was ambiguous, and the rules of other states were in flux. See Barger, 599 F. Supp at 1161, n.7 ("In attempting to determine the substantive law of Virginia I will rely on the relevant holdings of the Virginia Supreme Court and resolve this question as I believe that court would."). The more recent Fourth Circuit opinion in Nguyen makes clear, however, the Virginia is more strict than most jurisdictions in allowing employee handbooks to be admitted as evidence of an implied contract. 44 F.3d at 239, 240 n.5 (upholding summary judgment for employer where language of employee manual insufficient to rebut at-will presumption; also noting that the statute of frauds applies in Virginia). In this instance, the employee handbook is inadmissible, and the plaintiff is otherwise unable to provide evidence that an implied contract existed between himself and his employer. Accordingly, summary judgment will be entered in favor of the defendant on the plaintiff's claim for breach of implied contract.

V.

In conclusion, the plaintiff's claims under the ADEA and for breach of an implied contract cannot withstand the defendant's motion for summary judgment. The plaintiff has been unable to make out

a prima facie case for age discrimination either through a direct proof scheme or through the elements of the McDonnell Douglas test. On his breach of contract claim, the plaintiff cannot show that his employer created a just cause rule for terminating its employees; the employee handbook on which the plaintiff's claim is based is neither sufficient clear to rebut the at-will presumption under Virginia law, nor does it comply with the Virginia statute of frauds. Summary judgment will therefore be entered in favor of the defendant on both of the plaintiff's claims.

The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to all counsel of record.

ENTER: This 1st day of November, 1995.

James C. Turk
United States District Judge

Supreme Court, U.S.
FILED
JUL 21 1997
CLERK

No. 96-2010

In The

Supreme Court of the United States

October Term, 1996

JAMES LARRY RHYMER,

Petitioner,

vs.

YOKOHAMA TIRE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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25 pp

QUESTION PRESENTED FOR REVIEW

Can a plaintiff survive summary judgment in an age discrimination case where the plaintiff supports his claim that the employer's nondiscriminatory reason for the plaintiff's discharge is false or unworthy of credence with evidence that the plaintiff's supervisors, who were not participants in the decision-making process, did not agree with the sole decision maker's conclusion that the plaintiff's inadequate job performance was grounds for termination, and the plaintiff has proffered no evidence that the decision maker was motivated by the plaintiff's age.

LIST OF PARTIES TO PROCEEDING

Petitioner: James Larry Rhymer

Respondent: Yokohama Tire Corporation

Parents and Nonwholly Owned Subsidiaries of Respondent: Yokohama Corporation of North America (parent corporation)

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Rhymer v. Yokohama Tire Corporation, Case No. 93-0198-R, Final Order (W.D. Va. Jan. 8, 1996)

Rhymer v. Yokohama Tire Corporation, Case No. 96-1191, Opinion (unpublished) (4th Cir. Jan. 16, 1997)

SUMMARY OF ARGUMENT

James Larry Rhymer's ("Rhymer") Petition should be denied, for two reasons. First, this Court's decision of the issue presented by Rhymer is unnecessary because it is based upon a faulty premise which is not supported by the record evidence or by the decision below. Accordingly, a decision as to this issue is not outcome determinative and would amount to nothing more than an advisory opinion by this Court. Essentially, Rhymer frames the issue as follows: whether summary judgment can ever be granted in an age discrimination case where the plaintiff has established a *prima facie* case and has raised a genuine issue of material fact as to whether the employer's nondiscriminatory reason for the plaintiff's discharge is false or unworthy of credence. This purported issue, however, is not presented by this case because Rhymer failed to present any evidence that the Respondent Yokohama Tire Corporation's ("Yokohama") nondiscriminatory reason for his discharge was false or unworthy of credence, since he failed to show that the decision maker (Y. Hanabusa, Yokohama's President and CEO) ("Hanabusa") was motivated by any reason other than that which was

articulated (poor analytical skills resulting in deficient job performance) — *i.e.*, that Hanabusa did not honestly believe in this asserted reason. The fact that Rhymer's supervisors (who were themselves critical of Rhymer's analytical ability) did not agree with Hanabusa that Rhymer's deficiencies warranted termination does nothing to disprove that Hanabusa was motivated by Rhymer's job performance in terminating his employment.

Second, the Fourth Circuit Court of Appeals applied the appropriate rule of law in this case and there is no conflict between it and the other circuit courts of appeal. Contrary to Rhymer's contention, the Fourth Circuit does not necessarily require a plaintiff to present additional evidence of age-based animus in order to overcome the employer's stated reason for the discharge and survive summary judgment. The court only required Rhymer to come forward with such evidence here because Rhymer presented no evidence disproving Hanabusa's nondiscriminatory explanation — *i.e.*, evidence showing that explanation to be false or unworthy of credence.

Accordingly, Rhymer has presented no viable question for review by this Court, and his Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. Statement of Proceedings

Rhymer instituted suit against Yokohama in the United States District Court for the Western District of Virginia. Rhymer alleged that his employment with Yokohama was terminated in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (the "ADEA").

1. District Court Proceedings

On July 20, 1995, Yokohama filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56. The bases for Yokohama's motion in connection with Rhymer's ADEA claim were multiple, including: (1) Rhymer could not establish a *prima facie* case of age discrimination because he was not performing his job at a level which met Yokohama's legitimate job expectations;[1] and (2) even if Rhymer could establish a *prima facie* case of age discrimination, there was an absolute failure of proof by Rhymer that the nondiscriminatory reason of the decision maker (Hanabusa) for Rhymer's discharge (inadequate analytical skills resulting in poor job performance) was a pretext for age discrimination.

The district court granted Yokohama's motion for summary judgment. *Rhymer v. Yokohama Tire Corporation*, Case No. 93-0198-R, Memorandum Opinion (W.D. Va. Nov. 1, 1995), slip op. at 8-11 (JA at 23-26).[2] First, it determined that Rhymer presented no evidence of Yokohama's intent to discriminate against him because of his age. *Id.*, slip op. at 8-9 (JA at 23-24). Second, applying the burden-shifting proof scheme enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the district court concluded not only that Rhymer had not established a *prima facie* case of age discrimination, but also

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1. Yokohama also argued that Rhymer was replaced by a person within the protected class and therefore could not establish the fourth element of a *prima facie* case. The district court agreed. Subsequently, this Court issued its decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1310 (1996), and the Fourth Circuit, following *O'Connor*, found sufficient evidence of the fourth *prima facie* element in that Rhymer's replacement may have been "substantially younger" than he.

2. The abbreviation "JA" is meant to refer to the Joint Appendix which was filed with the court of appeals below.

that there was insufficient evidence that Hanabusa's legitimate, nondiscriminatory reason for terminating Rhymer's employment was a pretext for age discrimination. *Id.*, slip op. at 9-11 (JA at 24-26).

In his effort to obtain the attention and review of this Court, Rhymer has misstated the district court's findings pertaining to the *McDonnell Douglas* proof scheme. The court did not, as Rhymer asserts at p. 3 of his Petition, find a genuine issue of fact as to whether Hanabusa's reason for the discharge was false and thus pretextual. To the contrary, the district court expressly found Hanabusa's reason not to be pretextual. *Id.*, slip op. at 11 (JA at 26). Rather, in connection with its initial analysis of the sufficiency of Rhymer's proof of a *prima facie* case, the district court simply found there to exist a triable factual issue as to the third *prima facie* element — whether Rhymer performed his job at a level which met Yokohama's legitimate job expectations.

2. Court of Appeals Proceedings

Before the Fourth Circuit, Rhymer proceeded solely under the *McDonnell Douglas* proof scheme. Rhymer argued that he had presented sufficient evidence to create a triable issue as to whether Hanabusa's reason for terminating his employment (inadequate analytical skills resulting in poor job performance) was false or unworthy of credence, and therefore a pretext for age discrimination. In support of this contention, Rhymer argued that his immediate supervisors (Richard Switzer and Matthew Anderson) — who had no part in Hanabusa's decision and, indeed, who had questioned Rhymer's analytical skills themselves — disagreed with Hanabusa's decision that Rhymer's inadequate performance warranted termination. Rhymer also argued that the fact that he received a bonus in 1991 somehow constituted proof that Hanabusa's reason for termination was

pretextual, although the record contains no evidence that Hanabusa had anything whatsoever to do with Rhymer's bonus.

The court of appeals affirmed the district court's grant of summary judgment in favor of Yokohama, holding that Rhymer failed to create a triable issue of fact that Hanabusa's reason for terminating his employment was a pretext for age discrimination. In reaching that conclusion, the court of appeals applied the following standard:

> "[I]f the plaintiff offers nothing to disprove the defendant's nondiscriminatory explanation[ ], the explanation['s] weakness alone is insufficient to create an issue of pretext." [Citation omitted.] The plaintiff bears the ultimate burden of presenting "affirmative evidence of age-based animus." [Citation omitted.]

Rhymer v. Yokohama Tire Corp., Case No. 96-1191, unpublished, slip op. at 8 (4th Cir. Jan. 16, 1997) (quoting *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 732 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997)).

Rhymer's case rests upon the theory that his supervisors' disagreement with Hanabusa's decision served to disprove Hanabusa's reason for it and thus created a factual issue as to pretext. In rejecting this theory, the court of appeals held as follows:

> Rhymer argues that his immediate supervisors, Switzer and Anderson, did not agree with Hanabusa's decision to fire him. He reasons, therefore, that his job performance must have been satisfactory and

> the real reason for his termination must have been his age. . . . Although Switzer and Anderson, who were themselves critical of Rhymer's job performance, did not think that Rhymer's inadequacies rose to a level warranting termination, that does not support an inference that Hanabusa (the company president) fired Rhymer because of age discrimination.

Id., slip op. at 6-7.[3] Because Rhymer was unable to establish facts to show that Hanabusa's reason for the discharge was pretextual or a lie, it was incumbent upon Rhymer to produce other affirmative evidence of age-based animus under the Fourth Circuit's standard. The court of appeals concluded that he had not done so.[4] *Id.*, slip op. at 7.

B. Statement of the Facts

Rhymer was hired by Mohawk Rubber Company ("Mohawk") in 1964 and became Mohawk's Plant Controller in 1969 at its Helena, Arkansas facility. (JA at 69, 70.) After transferring to Mohawk's Salem, Virginia plant in 1976 and

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3. The court of appeals commented on the plaintiff's failure to depose Hanabusa, but emphasized that there *was* evidence in the record that Hanabusa was dissatisfied with Rhymer's job performance. Presumably, Rhymer chose not to depose Hanabusa because he knew that Hanabusa's decision was not motivated by age.

4. Rhymer's purported evidence of age-based animus consisted of statistics regarding Yokohama's management workforce and a double hearsay statement from unidentified individuals which had no nexus to Hanabusa or his decision to discharge Rhymer. The court of appeals correctly held that the statistics and the double hearsay statement did not constitute affirmative evidence of age-based animus on the part of Hanabusa. *Id.*, slip op. at 7. Rhymer has not disputed that conclusion in his Petition.

serving there as Plant Manager for several years, Rhymer became the Salem facility's Plant Controller in 1988. (JA at 71.) In 1989, Mohawk was purchased by Yokohama, and the Salem facility was thereafter under new management and overseen by Hanabusa, Yokohama's president and CEO. (JA at 38.) On February 24, 1992, Rhymer's employment was terminated. The decision to terminate Rhymer's employment was made solely by Hanabusa. (JA at 104.)

As Plant Controller, Rhymer was responsible for all of the Salem plant's finances, including preparation and compilation of the annual and capital budgets and monthly production of documents relating to variances. (JA at 41-42.) Rhymer was also charged with analyzing and recommending ways to control the growing usage variance (*i.e.*, shrinkage of inventory) problem at the Salem plant. (JA at 127-128.)

Rhymer's discharge resulted from Hanabusa's dissatisfaction with Rhymer's ability to perform adequately the analytical functions of Plant Controller. Principally, Hanabusa was troubled by Rhymer's difficulty in analyzing and recommending ways to control the usage variance problem. In September of 1991, Hanabusa instructed Rhymer to prepare a written, detailed explanation of the usage variance, including a discussion of potential countermeasures to be taken. (JA at 110-111, 156.) Rhymer was told to report on this issue on a monthly basis in memo format, with the first report due by October 18, 1991. (JA at 109-112, 202-203.) Rhymer failed to submit the first report as requested (JA at 61-62, 111-112), even though he knew that there was an urgency, from Hanabusa's standpoint, to provide the usage variance countermeasures. (JA at 132-133.) In fact, he did not begin to prepare the report until November 12. (JA at 129-130.)

Hanabusa's observations of Rhymer's analytical deficiencies were shared by his supervisors, Richard Switzer

("Switzer") and Matthew Anderson ("Anderson"). (JA at 43, 45-46, 54-55, 65.) For instance, Switzer believed that Rhymer "didn't have the ability to do the analysis that was necessary," and that Rhymer's shortcomings became a "serious situation." (JA at 45-46.)[5] Likewise, Anderson believed Rhymer's "overall" performance to be deficient from an "analytical standpoint." (JA at 65.) Anderson also "didn't feel [Rhymer] had an understanding of the reason or the mechanics of the allocation of costs between brands, the purpose behind it." (JA at 55.) Thus, while Switzer and Anderson may have disagreed with Hanabusa that Rhymer's deficiencies warranted termination, there is no dispute that they questioned Rhymer's analytical ability.

In January of 1992, Rhymer was requested to attend an executive meeting, attended by Hanabusa, and was told in advance to be prepared to address the usage variance problem in the Salem plant. (JA at 139-140, 178.) During this meeting, Hanabusa asked Rhymer questions about the usage variance problem. (JA at 141, 178.) However, Rhymer was unprepared and unable to answer some of Hanabusa's questions regarding the variance analysis, and he proposed no solutions to the problem. (JA at 141-142, 178.) For instance, Rhymer was unable to compare the variance numbers for 1991 with those for 1989 and 1990, and thus was unable to report as to whether there had been an improvement or a loss. (JA at 141-142, 178.)

Given Rhymer's inability to perform the analytical responsibilities of a plant controller, and principally his inability to analyze the usage variance problem and recommend ways to improve it, his employment relationship with Yokohama was terminated on February 24, 1992 by Hanabusa.[6] The decision to

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5. In an affidavit, Rhymer also conceded that Switzer had informed him directly that he (Rhymer) "was not doing some things." (JA at 200.)

6. Rhymer was not, as he claims at p. 7 of his Petition, discharged for failing to *correct* the usage variance problem — for he was never instructed

(Cont'd)

terminate Rhymer's employment was made solely by Hanabusa and no one else. (JA at 104.) Throughout this matter, Rhymer has conceded that neither Switzer nor Anderson had any participation whatsoever in his discharge. (JA at 104; Rhymer Petition, p. 7.) Indeed, while not involved in Hanabusa's decision, Switzer himself had no reason to believe that the decision had anything to do with Rhymer's age. (JA at 107, 52.)

After Rhymer's employment was terminated, the usage variance problem improved. (JA at 49.)[7] Although Rhymer alleges that an accounting firm has indicated that the variance numbers improved by January of 1992, the record contains no admissible evidence in support of this hearsay statement. Further, although Rhymer cites to Anderson's testimony in support of his claim that he returned to the Salem plant to explain his countermeasures to the usage variance problem (Rhymer Petition, p. 8), Anderson's testimony does not support this proposition. Anderson stated that he does not remember whether this occurred (JA at 51-52), and there is no record evidence indicating that it did.

(Cont'd)
to correct it, but rather to understand the issue, analyze it, and make recommendations. Moreover, Rhymer understates the reason for his discharge by narrowly focusing upon the usage variance issue. The problem was much more fundamental — Rhymer did not have the analytical ability to meet the requirements of his job, and his inability to analyze the usage variance problem was an example of his lack of analytical skills.

7. Throughout these proceedings, Rhymer has characterized the status of the usage variance problem after his discharge to suit his purpose. In the district court, in an affidavit, Rhymer contended that this problem "continued after I left the company." (JA at 201) Now, in support of his attempt to have this case reviewed yet again, Rhymer contends that the variance problem improved (allegedly as a result of something he did) after he left Yokohama.

REASONS FOR DENYING THE WRIT

I.

SINCE RHYMER'S SUPERVISORS' DISAGREEMENT WITH HANABUSA'S DECISION TO TERMINATE RHYMER'S EMPLOYMENT DOES NOT CONSTITUTE EVIDENCE THAT HANABUSA'S REASON FOR DISCHARGING RHYMER WAS FALSE OR UNWORTHY OF CREDENCE, THERE IS NO NEED FOR THIS COURT TO ADDRESS THE ISSUE FRAMED BY RHYMER.

Rhymer has requested that this Court determine whether summary judgment is ever appropriate in cases where the plaintiff has established a *prima facie* case and has raised a genuine issue of material fact as to whether the employer's nondiscriminatory reason for discharge is false or unworthy of credence. This particular case, however, does not present the Court with this purported issue because Rhymer did not produce any evidence that Hanabusa's reason for discharging him was false or unworthy of credence.

According to Rhymer, the Fourth Circuit "determined that even though Rhymer had presented evidence that Yokohama's proffered reason was false, summary judgment was nonetheless appropriate because he failed to produce other additional evidence of discrimination." (*Id.*) Rhymer has misstated the Fourth Circuit's opinion. Although the Fourth Circuit found there to be a factual issue as to whether Rhymer performed his job adequately in connection with its analysis of Rhymer's *prima facie* case, the Fourth Circuit did not hold that Rhymer had raised a triable factual issue as to whether Yokohama — *i.e.*, Hanabusa — had lied in stating that Rhymer was discharged for poor job performance. The evidence offered by Rhymer in support of his claim that Hanabusa did not terminate Rhymer's employment

due to his poor job performance essentially consisted of his belief that his supervisors disagreed with Hanabusa's decision. As the court of appeals properly held, while this evidence was relevant to the third element of Rhymer's *prima facie* case, it did not create a genuine issue of material fact as to the veracity of Hanabusa's reason for terminating Rhymer's employment. *Id.*, slip op. at 6-7.

Rhymer's position is fundamentally flawed and demonstrates an inherent misunderstanding of the pretext element of an age discrimination claim. Whether an employee is performing his job adequately is relevant to the third element of a *prima facie* case. At the pretext stage, however, "the employee must show that the employer did not honestly believe in the reasons it gave for firing him." *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 175 (1996), *reh'g denied*, 117 S. Ct. 546 (1996). *See also McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992); *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Accordingly, the third *prima facie* element and the issue of pretext are two distinct inquiries. *See Williams v. Williams Electronics, Inc.*, 856 F.2d 920, 923-924 (7th Cir. 1988) (holding that the plaintiff had established a *prima facie* case, but that the plaintiff's evidence that he had performed satisfactorily "do[es] not create a basis upon which it can be concluded that [the employer] did not genuinely and honestly weigh performance-based considerations in making its layoff decision"); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1224 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (although there was a dispute about whether the plaintiff's work was satisfactory, there was no dispute that the decision makers did not believe the plaintiff's work to be satisfactory). Put another way, that the decision maker may be mistaken about the facts underlying the discharge does not mean that the reason is pretextual. *See Randle v. City of Aurora*, 69 F.3d 441, 455

(10th Cir. 1995) ("just because the reason relied upon for a certain action is mistaken does not mean that the reason is pretextual"); *Fuentes v. Perskie*, 32 F.3d 759, 765 (3rd Cir. 1994) ("To discredit the employer's proffered reason, . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent"); *Kralman v. Ill. Dept. of Veterans' Affairs*, 23 F.3d 150, 156 (7th Cir. 1994), *cert. denied*, 513 U.S. 948 (1994) ("It is important to keep in mind . . . that there is a fine line between evidence that appropriately challenges the employer's proffered reasons as being unworthy of credence and evidence that merely shows that the employer made a mistake or a bad business judgment").

Thus, in examining the issue of pretext, there is a critical distinction between the beliefs of non-decision makers and the beliefs of the individual who makes the decision to discharge the plaintiff. A difference of opinion over an employee's job performance between coworkers, on the one hand, and the decision maker, on the other hand, does not equate with evidence that the decision maker's beliefs about the plaintiff's job performance are false or unworthy of credence. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125 (7th Cir. 1994) ("[t]he mere submission of materials from a co-worker or supervisor indicating that an employee's performance is satisfactory . . . does not create a material issue of fact" on the issue of pretext).[8] *See also Williams*, 856 F.2d at 924

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8. Before the court of appeals, Rhymer attempted to distinguish *Anderson* by arguing that this case involves additional evidence of age discrimination not present in *Anderson*. This evidence consisted of statistical information regarding Yokohama's workforce and a double hearsay statement having no nexus to Hanabusa's termination decision. (*See* note 3, above.) As the court of appeals correctly held, this "evidence" does not support Rhymer's claim that Hanabusa was motivated by Rhymer's age. Thus, the decision in *Anderson* is unquestionably on point as to the dispositive issue presented (Cont'd)

(supervisor's testimony that plaintiff's performance was satisfactory was not enough to create a genuine issue of material fact as to whether the employer honestly considered performance-related factors in determining who would be laid off); *Kephart*, 630 F.2d at 1223 (affidavits of fellow employees stating that the plaintiff's performance was satisfactory were not enough to create a material issue of fact as to whether the decision maker genuinely believed that the plaintiff was not performing satisfactorily).

A different case would be presented where there is evidence that a decision maker actually believed that the employee was performing well (*e.g.*, by rendering a favorable job evaluation), yet discharged the employee for the false reason that he was performing poorly. Since the inconsistency lies with the decision maker, a genuine issue of fact might well exist as to whether the employer's nondiscriminatory reason is false or unworthy of credence. *See Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1160-1162 (6th Cir. 1991) (decision makers' claim that they discharged the plaintiff for poor job performance found to be pretextual because, *inter alia*, it was inconsistent with the decision makers' post-discharge letters praising the plaintiff's job performance); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229, 231 (6th Cir. 1990) (decision maker's claim that he discharged the plaintiff for deficient performance and insubordination found to be pretextual because inconsistent with the decision maker's comments at a party that the plaintiff was an "excellent" and "key" employee who did "perfect" work). This is not such a case. Rhymer presented no evidence that Hanabusa ever believed Rhymer to be performing his job well.

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here: whether the views of co-workers about the plaintiff's job performance can support the plaintiff's claim that the decision maker was not motivated by job performance issues in discharging the plaintiff (and thus that the reason is false or unworthy of credence).

He, therefore, presented no evidence that Hanabusa's reason for discharging him was false or unworthy of credence.

If Rhymer's view were accepted, then all employment discrimination plaintiffs discharged for poor job performance who establish a *prima facie* case would automatically and necessarily demonstrate pretext in the same showing. Employment discrimination defendants would always be liable in such cases upon the plaintiff's establishment of a *prima facie* case. Such a result is contrary to this Court's teachings — for if the fact finder's disbelief of the employer's nondiscriminatory reason does not compel a finding for the plaintiff at the pretext stage (as this Court held in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)), then surely the mere establishment of a *prima facie* case cannot compel such a finding.

There is no evidence in this case that Hanabusa's reason for terminating Rhymer's employment was false or unworthy of credence. Consequently, the issue framed by Rhymer is not appropriately before this Court and no viable question for this Court to review has been presented.

II.

THE FOURTH CIRCUIT COURT OF APPEALS HAS NOT HELD THAT A PLAINTIFF IS ALWAYS REQUIRED TO PRESENT EVIDENCE OF AGE-BASED ANIMUS IN ADDITION TO EVIDENCE THAT THE EMPLOYER'S NONDISCRIMINATORY REASON IS FALSE OR UNWORTHY OF CREDENCE, IN ORDER TO SURVIVE SUMMARY JUDGMENT, AND ITS VIEW IS CONSISTENT WITH OTHER COURTS OF APPEAL.

Under the *McDonnell Douglas* proof scheme, the defendant's articulation of a nondiscriminatory reason for the plaintiff's discharge rebuts the plaintiff's *prima facie* case and squarely places the ultimate burden on the plaintiff to prove that the defendant was motivated by the plaintiff's protected class (in this case age). *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-508 (1993). In order for the plaintiff to successfully establish this, he must show that the employer's nondiscriminatory reason is a pretext for intentional discrimination. *Id.* This means that the plaintiff must establish both that the employer's nondiscriminatory reason is false, and that discrimination was the real reason. *Hicks*, 509 U.S. at 515. "[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (quoted in *Hicks*).

Because Rhymer did not present evidence to create an issue of fact as to pretext, the Fourth Circuit did not need to apply *Hicks* but, instead, appropriately applied the following rule in this case:

> [I]f the plaintiff offers nothing to disprove the defendant's nondiscriminatory

> explanations, the explanations' weakness alone is insufficient to create an issue of pretext. Instead, the burden of production returns to the plaintiff to present affirmative evidence of age-based animus.

Burns v. AAF-McQuay, Inc., 96 F.3d 728, 732 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997) (quoted by the Fourth Circuit in its decision below). Thus, the issue of whether or not there exists a conflict among the circuit courts of appeal as to the application of *Hicks* in the "pretext for discrimination" context is not even properly before the Court. As the Fourth Circuit implicitly recognized (indeed, the Fourth Circuit did not even cite *Hicks* in its decision below), those cases do not control this case. As in *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 443-444 (11th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3861 (June 27, 1997), and as discussed in more detail above, Rhymer failed to create "an issue of fact about the disbelievability of the employers reason for the firing decision." *Isenbergh*, 97 F.3d at 444. Accordingly, the Fourth Circuit did not reach or address this issue or the cases concerning it since it found that Rhymer had failed to create a genuine issue of fact as to pretext.

Moreover, even had the Fourth Circuit reached this issue, Rhymer erroneously reads the *Burns* case to say that at the summary judgment stage, a plaintiff in an age discrimination case is always required to present evidence of age-based animus. The express language of *Burns* does not support Rhymer's view. Under the *Burns* holding quoted above, the plaintiff will be required to come forward with such evidence if he is unable to disprove the employer's nondiscriminatory reason (which Rhymer failed to do here). *Burns*, 96 F.3d at 732. Rhymer's obvious overstatement of the rule of the law also overlooks those cases where evidence of age animus is not necessarily required

— such as where the plaintiff has presented such strong evidence that the decision maker's proffered reason is fundamentally at odds with the record evidence (*see Wheeler* and *Kraus*, *supra*).

It would appear that the *Burns* case and thus the Fourth Circuit does not endorse a strict "pretext plus" standard — where to survive summary judgment a plaintiff must *always* prove animus. It appears that *Burns*, like cases from other circuits, applied a middle ground rule of law. Under this approach, in the context of summary judgment, where a plaintiff has established a *prima facie* case and has established sufficient evidence for a jury to disbelieve the reasons proffered by the employer, the trial court nevertheless may decide that the evidence is insufficient for a reasonable juror to infer age discrimination and therefore, grant summary judgment in favor of the employer. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996); *Isenbergh*, 97 F.3d at 441; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 261-262 n.3 (1st Cir. 1994). In any event, because there is no evidence of pretext in this case and no conflict among the circuits to be resolved, there is no need for this Court to review this matter.

CONCLUSION

A determination of the issue framed by Rhymer would not have any impact upon the merits of this case, and thus any decision of this Court would amount to nothing more than an advisory opinion. Further, the Fourth Circuit Court of Appeals applied the correct legal standard and its decision is not in conflict with the decisions of this Court or those of other circuits. For these reasons, Rhymer's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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